IN THE HIGH COURT OF SOUTH AFRICA
SOUTH GAUTENG HIGH COURT
JOHANNESBURG

REPORTABLE

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES / NO	
(2) OF INTEREST TO OTHER JUDGES: YES / NO	
(3) REVISED.	
..... DATE	..... SIGNATURE

In the following matters: **EZEKIEL NTSHENO (also spelt NTSHINU) v THE STATE (CASE NO. A181/2009); DLADLA DLAMINI v THE STATE (CASE NO. A182/09); and TSEKO RAMPA v THE STATE (CASE NO. A180/09)**

JUDGMENTS

WILLIS J:

EZEKIEL NTSHENO (also spelt NTSHINU) v THE STATE (CASE NO. A181/2009)

Date of hearing: 12th August, 2009

Date of judgment (*Postea*): 8th September, 2009

[1] During the week commencing 11th August, 2009 Makhanya, Makgoka JJ and I sat as a full court in the South Gauteng High Court to consider three separate criminal appeals in matters which, in each instance, were decided by a single judge of this division. These appeals are commonly known as "full bench appeals". Each of these appeals has turned on the same legal principle: the correct interpretation relating to the making of an appropriate finding that "substantial and compelling circumstances" exist such as to justify the imposition of less than the prescribed minimum sentence in terms of the Criminal Law Amendment Act No 105 of 1997 ("The Criminal Law Amendment Act") - more especially when the accused is still relatively youthful but not a juvenile[1] – and, consequent upon the finding that there were indeed such circumstances, the imposition of a just sentence. Makhanya J has written the judgment in the case of *Dlamini v The State* (case no. A182/2009), Makgoka J in the case of *Rampa v The State* (case no. 180/2009) and I in the case of *Ntsheno v The State* (case no. 181/2009). We have, in each instance, been unanimous in our decision that we should interfere with the sentence imposed by the relevant judge.

[1] In terms of section 28 (3) of the Constitution a "child" is defined as "a person under the age of 18 years" Se also the illuminating observations of Cameron J in this regard in the case of *Centre for Child Law v Minister of Correctional Services & Others* (Case CCT 98/08; [2009]ZACC 18) at paragraph [39]

We have been much influenced by the recent judgments of the Constitutional Court in the case of *Centre for Child Law and Minister for Justice and Constitutional Development and Others* (CCT 98/08; [2009] ZACC 18]. As far as we are aware, the judgments of this court are the first full bench appeals in this division concerning the issue of finding that "substantial and compelling circumstances" exist such as to justify the imposition of less than the prescribed minimum sentence in terms of the Criminal Law Amendment Act since the *Centre for Child Law* case. Accordingly, we consider that our judgments are, collectively, "reportable": they may be of considerable practical importance. By reason of the fact that each case was argued separately and on a different day of the week, we have considered it proper that a separate judgment should be delivered in each instance. Nevertheless, we have, unavoidably, considered these cases together. Each of us has, in preparing his written judgment, inevitably referred to the judgments of the others with approval. Accordingly, we consider it appropriate to deliver our judgments in a format that reflects the fact that although we have prepared three separate judgments they are, for practical purposes, almost to be read as a single judgment dealing with the three separate cases argued together. In certain respects these three judgments, collectively, may be considered to constitute a trilogy.

[2] I shall now deal specifically with the case of *Ntsheno v The State*. The appellant appeals against sentence only. He

was convicted in the Soweto Regional Magistrate's Court on 9th October, 1998 on two counts of rape and one count of kidnapping. The matter was referred to the High Court for sentencing in terms of sections 51, 52 and 53 of the Criminal Law Amendment Act No 105 of 1997 which came into operation on 1 May 1998 in terms of Presidential Proclamation R43 of 1st May 2008. The crimes were committed on 9th August, 1998.

[3] The matter came before Stegmann J. He referred the matter of the sentence in respect of the count of kidnapping back to the Regional Court. It would seem that the learned magistrate imposed a sentence of two years on that count. The sentence was imposed on1st March, 2009.

[4] The appellant was the second accused in the trial. His co-accused was Marumo Mofokeng. Stegmann J confirmed the convictions of both accused and sentenced both accused to life imprisonment, taking the two counts of rape as one for purposes of sentence. The judgment of Stegmann J in regard to sentence for rape is reported as *S v Mofokeng and Another* 1999 (1) SACR 502 (W). It is well known: perhaps because it begins with the famous quote from Lewis Carroll's *Alice in Wonderland* in which the Queen says "Sentence first – verdict afterwards" and then proceeds to pronounce "Off with her head"[2] as the sentence for Alice.

[2] In the more comical renditions of this story the Queen pronounces "off" as "orf", the accent being an imitation of that widely used by British aristocrats until recently.

Stegmann J seems to have disapproved of the procedure for sentencing in terms of the Criminal Law Amendment Act but considered himself duty bound to apply it.[3] Stegmann J found that there were no "substantial and compelling" circumstances present such as to justify less than the prescribed minimum sentence of life imprisonment in terms of the Criminal Law Amendment Act (the complainant had been raped more than once and by more than one person as provided for in Part I of Schedule 2 of the Criminal Law Amendment Act).

[4] Having reached the requisite age in terms of his years of service on the bench, Stegmann J has since been discharged from active service.[4] The application for leave to appeal came before Mathopo J on 28th August, 2007 in the absence of Stegmann J. The application was in respect of sentence only. Mathopo J granted leave. This is the reason that the matter is now before this court.

[5] The can be no question that the crime was serious indeed: the complainant was gang-raped by five or six youths.

[6] The appellant was 20 years old at the time. He was under the influence of alcohol. He was a first offender. He had been in custody for seven months prior to being

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[3] See 506d-f; 516j-521a

[4] Some prefer to say "retired". Stegmann J left the active service of the South Gauteng High Court in 2004.

sentenced. Counsel for the appellant both when the matter came before Stegmann J and in this court submitted that the facts that no dangerous weapon was used that there had been no serious physical injury of the complainant and that no serious psychological trauma on the part of the complainant were factors that should also be taken into account.

[7] The question of correct sentencing in matters such as this is vexing indeed. In *S v Mahamotsa* 2002 (2) SACR 435 (SCA) the Supreme Court of Appeal ("the SCA") imposed an effective sentence of twenty years on an appellant convicted of two counts of rape. The appellant had used a firearm and a knife to subdue his victim. In *S v Vilakazi* 2009 (1) SACR 552 (SCA) the SCA set aside a sentence of life imprisonment and imposed 15 years for a 30 year old accused who had raped a girl less than 16 years of age.

[8] In his judgment Stegmann J said:

> It is not easy to see how, in relation to the crime of rape, when a group of young men, acting in concert, have seized a woman, and each of them has repeatedly raped her, there can ever be circumstances that can honestly be described as be described as so 'substantial and compelling' as to justify the imposition of a sentence which is less severe than that which Parliament as seen to prescribe as the statutory sentence that is to result from the perpetration of the crime of rape

> in the manner and in the circumstances referred to in Part 1 of Schedule 2.[5]

[9] Stegmann J went on to say:

> The absence of previous convictions, the comparative youthfulness of the offenders, the unfortunate factors in their backgrounds, the probable effect upon them of the liquor which they had taken, the absence of dangerous weapons, and the fact that the complainant had not suffered serious injury are all factors that a court sentencing a convicted rapist in the ordinary course, would weigh up as substantial factors relevant to the assessment of a just sentence, and as tending to mitigate the severity of the punishment to be imposed. However, in my judgment, these factors, 'substantial though they are, are matters that Parliament must have had in mind as everyday circumstances that would be found present in many or most of the crimes referred to in Part I of Schedule 2 of Act 105 of 1997. Without emasculating the legislation, they cannot be thought of as 'compelling' the conclusion that a sentence lesser than that prescribed by Parliament should be substituted for the prescribed sentence. This is owing to the absence of any exceptional factor to explain the prisoners' conduct (which evidently sprang from nothing other than their own wicked desire to slake their lust regardless of the cost to the

[5] At 523d-e

> victim), and the absence of any mitigating factors other than the everyday factors already enumerated. As I understand this legislation, 'substantial and compelling' circumstances must be factors of an unusual and exceptional kind that Parliament cannot be supposed to have had in contemplation when prescribing standard penalties for certain crimes committed in circumstances described in Schedule 2.[6]

[10] The SCA dealt with this vexed question of minimum sentencing in the unforgettable judgment of *S v Malgas* 2001 (2) SA 1222 (SCA); 2001(1) SACR 469 (SCA); [2001] 3 ALL SA 220 (A). At paragraph [25] of that judgment the SCA said:

> Courts are required to approach the imposition of sentence conscious that the Legislature has ordained life imprisonment (or the particular prescribed period of imprisonment as the sentence that should *ordinarily* and in the absence of weighty justification be imposed for the listed crimes in the specified circumstances. Unless there are, and can be seen to be, truly convincing reasons for a different response, the crimes in question are therefore required to elicit a severe, standardised and consistent response from the courts. The specified sentences are not to be departed from lightly and for flimsy reasons. Speculative hypotheses favourable to the offender, undue sympathy, aversion to

[6] At 523i-524d

> imprisoning first offenders, personal doubts as to the efficacy of the policy underlying the legislation and marginal differences in personal circumstances or degrees of participation between co-offenders are to be excluded.

[11] The SCA, however, went on to say that:

> All factors (other than those set out in D above[7]) traditionally taken into account in sentencing, whether or not they diminish moral guilt) thus continue to play a role; none is excluded at the outset from consideration in the sentencing process.[8]

Herein lies an important point of departure from Stegmann J's judgment, more especially as the SCA judgment was given mindful, in general terms, of Stegmann J's judgment.[9] It seems that what Stegmann J described as "everyday" factors in sentencing were synonymous with what the SCA was describing as "traditional"[10]. Stegmann J considered it incorrect, as a matter of law, to have regard to such "everyday" factors in deciding whether one could depart from the minimum sentence. The SCA emphasised that they

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[7] i.e. speculative hypotheses favourable to the offender, undue sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy underlying the legislation and marginal differences in personal circumstances or degrees of participation between co-offenders.
[8] Also at para [25] of the judgment
[9] See footnote 3 of the SCA judgment
[10] The synonymousness of "everyday" with "traditional" may not be immediately apparent. If, however, one substitutes the word "usual", which in each instance seems to have been sense employed by both Stegmann J and the SCA when using the words "everyday" and "traditional" respectively, the issue acquires an easy clarity.

continue to play a role. Moreover, in the as yet unreported judgment of the Constitutional Court in *Centre for Child Law and Minister for Justice and Constitutional Development and Others* (CCT 98/08; [2009] ZACC 18] even the minority judgment, which would have declined to declare the minimum sentencing legislation in so far as it applies to children who are 16 and 17 years old inconsistent with the Constitution, emphasised the 'seminal importance' of the whole paragraph of the SCA judgment in the *Malgas* case,[11] part of which has been quoted in paragraphs [10] and [11] above in this judgment. In the majority judgment of the Constitutional Court in the *Centre for Child Law* case (which declared certain provisions of the Criminal Law Amendment Act relating to juvenile offenders to be inconsistent with the Constitution and therefore invalid) it was said:

> As explained earlier, under *Malgas*, *Dodo* and *Vilakazi*, the starting point for a sentence court is the minimum sentence, the next question being whether substantial and compelling circumstances can be found to exist. This is answered by considering whether the minimum sentence is clearly disproportionate to the crime.[12]

As we function in an hierarchical system of courts, it must be concluded that Stegmann J was wrong in regard to the obligation to impose the prescribed minimum sentence.

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[11] Paragraphs [111], [112] and [121] of the Constitutional Court judgment
[12] At paragraph [40]

Whether dealing with a question of fact or of law, when a court of appeal is convinced that the court below was wrong it is obliged to interfere if, in the result, it comes to a different conclusion from that of the court below.[13]

[12] Indeed, the very factors in the present case which Stegmann J considered could not be taken into account, *viz.* "the absence of previous convictions, the comparative youthfulness of the offenders, the unfortunate factors in their backgrounds, the probable effect upon them of the liquor which they had taken, the absence of dangerous weapons, and the fact that the complainant had not suffered serious injury"[14] must be considered. Furthermore, if one reads the evidence as a whole, it would not seem to be undue speculation in favour of the appellant to conclude that he acted under the influence of at least some of the others. If one takes the aggregate effect of these factors into account the minimum sentence is clearly disproportionate to the crime and accordingly, following the opinion of the majority of the Constitutional Court in *Centre for Child Law* case substantial and compelling circumstances must be found to exist.[15] I would also respectfully refer to the judgments of Makhanya J in *Dlamini v The State* (Case No. A182/09) (with which judgment Makgoka J and I concurred) and Makgoka J in *Rampa v The State* (Case No. A180/09) (with which judgment Makhanya J and I

[13] See *R v Dhlumayo* 1948 (2) SA 677 (A); *Mine Workers' Union v Broderick* 1948 (4) SA 959 (A) at 970; *R v Kuzwayo* 1949 (3) SA 761 (A) at 765.
[14] See At 523i-524d of Stegmann J's judgment and paragraph [8] above
[15] Paragraph [40] of the Constitutional Court's judgment

concurred). As was noted in paragraph 1 above, Makhanya , Makgoka JJ and I, sitting as a full court heard these three cases, including the one *in casu*, during the same week.

[13] Mr *Motaung*, who appeared for the appellant, referred to the fact that the appellant was not warned, before the commencement of the trail, that he was at risk of being sentenced to a prescribed minimum sentence in terms of the Criminal Law Amendment Act and, although they were asked whether they wanted legal representation which they declined, they may not have made an informed decision as to whether or not to obtain legal representation. He referred us, in particular, to the following case: *S v Legoa* 2003 (1) SACR 13 (SCA) at paragraph [27]. There is also the case of *S v Ndlovu* 2003 (1) SACR 331 (SCA) at paragraph [11]. By reason of the fact that we have, in any event, decided that we must interfere with the prescribed minimum sentence, the point does not require further consideration. We shall impose a sentence which we consider to be just in all the circumstances.

[14] Both Ms *Naidoo*, who appeared for the State, and Mr *Motaung* were strenuous in their submissions as to the appropriate sentence. Mr *Motaung* submitted that 18 years' imprisonment was the absolute maximum that would do justice to the case. Ms *Naidoo*, conversely, submitted that 20 years' imprisonment was the very minimum that would be consistent with justice. There is not a radical difference

between 18 and 20 years. On the other hand, the difference is not trifling. While it may often not be appropriate to determine the sentence to be imposed by taking the "happy median" between that contended for by the accused, on the one hand and the State, on the other, we consider that justice will be well served by doing so in this case. In all the circumstances an effective term of imprisonment of nineteen for the rape counts would be just: severe but not disproportionate.

[15] The following is the order of this court:

(i) The appeal against sentence is upheld;

(ii) The sentence imposed in this matter by Stegmann J on 1 March 1999 in respect of Ezekiel Ntsheno (also spelt Ntshinu) is set aside;

(iii) The sentence imposed on the aforesaid Ezekiel Ntsheno by Stegmann J is substituted with the following:

"(a) Nineteen years' imprisonment on each count of rape;

(b) The aforesaid sentences on the rape counts are to run concurrently with each other;

(c) The effective sentence for the rape counts, taken together, is therefore nineteen years' imprisonment."

(iv) The substituted sentence is antedated to 9th October, 1998.

DATED AT JOHANNESBURG THIS 8TH DAY OF SEPTEMBER, 2009

N.P.WILLIS

JUDGE OF THE HIGH COURT

I agree.

G.M.MAKHANYA

JUDGE OF THE HIGH COURT

I agree.

T.M. MAKGOKA

JUDGE OF THE HIGH COURT

MAKHANYA J:

DLADLA DLAMINI) v THE STATE (CASE NO. A182/2009)

Date of hearing: 11th August, 2009

Date of judgment (*Postea*): 8th September, 2009

[1] On 12 March 2002, Mr Dlamini, hereinafter referred to as "the appellant", was convicted together with two co-accused, after they had pleaded guilty, by the Kempton Park Regional Court. They were convicted on two counts involving rape and robbery with aggravating circumstances.

[2] The appellant was sentenced by the Regional Court to fifteen years imprisonment on each of these counts. Five years imprisonment, however, on count 2 (robbery), was ordered to run concurrently with the 15 years imprisonment on count one (rape). In the result the appellant was sentenced to an effective imprisonment term of twenty five years.

[3] In 2005 he approached this Court on appeal. The Appeal Court, on 28 November 2005, in terms of section 304(4) of the Criminal Procedure Act 51 of 1977 set aside his sentence and in terms of section 52(1) of Act 105 of 1997

the matter was referred to the High Court for sentence. This referral, I pause to note, was correctly made as the conviction on count of rape required the High Court to consider the imposition of a sentence of life imprisonment in respect of the count of rape unless it finds substantial and compelling circumstances.

[4] On 16 March 2006 Snyders J (as she then was) duly confirmed his conviction and consequently sentenced the appellant to life imprisonment. It is not completely clear but it appears that the two counts were taken together for purposes of sentence.

[5] The appellant is now, with the leave of the court below, appealing against the sentence.

[6] The facts upon which the appellant and his co-accused were convicted after pleading guilty are briefly as follows: On 21 September 2002 in Croydon they accosted the complainant Valerie Letsapa and at knifepoint robbed her of her Nokia 6110 cellphone, earrings and wrist watch. They then left. But after a while they all came back and at knifepoint again took her to the veld where she was stripped of her clothes and each one of them, in turn, had sexual intercourse with her without her consent.

[7] In sentencing the appellant Snyders J acknowledged that there were mitigating factors but also referred to the aggravating factors and concluded by saying the following:

> There are some mitigating factors in the circumstances of the accused, however, the seriousness of their crime and the circumstances in which it was committed is a seriously aggravating factor. In the circumstances I do not find that there are substantial and compelling circumstances to move this Court to deviate from the prescribed minimum of life imprisonment.

[8] In the seminal matter of *S v Malgas* 2001 (2) SA 1222 (SCA); 2001 (1) SACR 409 (SCA); [2001] 3 All SA 220 (A) at para [25] Marais JA observed as follows in connection with mitigating factors:

> All factors (other than those set out in 1 above) traditionally taken into account in sentencing (whether or not they diminish moral guilt) thus continue to play a role; none is excluded at the outset from consideration in the sentencing process.

[9] The majority judgment, in the yet unreported judgment of the Constitutional Court in *Centre for Child Law and Minister for Justice and Constitutional Development and Others (*CCT 98/08; [2009] ZACC 18 (a case which declared certain provisions of the Criminal Law Amendment Act

relating to juvenile offenders to be inconsistent with the Constitution and therefore invalid) it was stated:

> As explained earlier, under Malgas, Dodo, and Vilakazi the starting point for a sentencing court is the minimum sentence, the next question being whether substantial and compelling circumstances can be found to exist. This is answered by considering whether the minimum sentence is clearly disproportionate to the crime.

[10] I agree with the learned judge, Snyders J, that the crimes of which the appellant was convicted are serious and that:

> One only needs to open the paper to see the extent of crime, violence and particularly rape in the South African community.

One understands, and appreciates as well that current levels of crime are unacceptable. Nevertheless it appears to me that the appellant's youthfulness (19 years) is a factor that the court *a quo* ought to have attached more weight than it had in the determination of an appropriate sentence. Indeed youthful offenders have been found by our courts to be naturally immature, lacking in judgment and self-control. They have also been found to be susceptible to the influence of others (accused 1 was 25 years old). See *S v Machasa* 1991 (2) SACR 308 (A). Other factors that appear

to me not having been given due weight are the following: Absence of planning or premeditation in respect of rape. See *R v Taylor* 1949 (4) SA 702 (A) at 716; *R v Mlambo* 1960 (2) SA 55 (W); *S v Molale* 1973 (4) SA 725 (O) at 726D-E; S V *Van Rooi en Andere* 1976 (2) SA 580 (A) at 584G-H. Indeed it appears that robbery was the group's motive in accosting the victim. For they left after its commission. The rape of the victim thereafter was clearly carried out on the spur of the moment. By pleading guilty the appellant showed contrition and as such prospects of his rehabilitation are clearly enhanced. The fact that no serious physical injuries were sustained by the complainant should also have been given due weight. See *S v Mahomotsa* 2002 (2) SACR 435 (SCA).

[11] Physical and psychological aspects which appear in my opinion, to likely have had negative influence in the appellant's personality development as it appears in the probation officer's report include: the troubled socio-economic environment in which the appellant grew up. His poor and broken family. He lost his father when he was hardly one year old. It appears also that as a young teenager, he was sexually abused by a prospective employer who had promised him some temporary employment. It has also not been disputed by the State that the appellant was not only a scholar at the commission of these offences but a first offender in respect of the category of offences involving sex.

[12] In my opinion, considering the authorities cited above, the above stated mitigating factors cumulatively constitute substantial and compelling circumstances. The minimum sentence of life imprisonment imposed is disproportionate to the crime, taking into account all the relevant circumstances. I would also respectfully refer to the judgments of Willis J in the case of *Ntsheno v The State* (Case No. A181/09) with which judgment Makgoka J and I concurred and of Makgoka J in the case of *Rampa v The State* (Case No. A180/09) with which judgment Willis J and I concurred. (Willis, Makgoka JJ and I heard these three similar cases, including this one, in the same week.)

[13] In the light of these factors we should intervene and substitute the sentence imposed by the court below with the one that is appropriate in the opinion of this court.

[14] The following is the order of this court:

(i) The appeal against sentence is upheld.

(ii) The sentence imposed by Snyders J on 16 March 2006 on the appellant is set aside.

(iii) The sentence imposed on the appellant is substituted with the following:

"(a) On the count of rape, 20 years imprisonment.

(b) On the count of robbery, 13 years imprisonment.

(c) It is ordered that 10 years imprisonment on the count of robbery runs concurrently with imprisonment sentence on the count of rape.

(d) Accordingly the accused is sentenced to an effective imprisonment sentence of 23 years."

(iv) The substituted sentence is antedated to 2 May 2002.

DATED AT JOHANNESBURG THIS 8TH DAY OF SEPTEMBER, 2009

G.M. MAKHANYA
JUDGE OF THE HIGH COURT

I agree.

N.P. WILLIS

JUDGE OF THE HIGH COURT

I agree.

T. M. MAKGOKA

JUDGE OF THE HIGH COURT

MAKGOKA J:

CAPTIAN TSEKO RAMPA v THE STATE (CASE NO. A180/2009)

Date of hearing: 13th August, 2009

Date of judgment (*Postea*): 8th September, 2009

[1] This is an appeal against sentence. The appellant, a 20 year old, stood trial in the regional court, Tembisa, on five counts, namely kidnapping, robbery with aggravating circumstances, two counts of rape and unlawful possession of a firearm and ammunition.

[2] The appellant, who enjoyed legal representation throughout his trial, pleaded not guilty to all counts. Despite his plea of not guilty, the trial culminated in his

conviction on all the five counts on 11 May 2004. In terms of section 52 of Act 105 of 1997, the regional magistrate stopped the proceedings upon conviction and referred the appellant to the High Court for sentencing. Counts 2, 3 and 4 attracted minimum sentences of 15 years' imprisonment and life sentence, respectively, unless substantial and compelling circumstances were found to exist. Satchwell J confirmed the conviction and sentenced the appellant as follows: count 1, 3 years imprisonment; count 2, 10 years imprisonment; counts 3 and 4, life imprisonment; and count 5, 2 years imprisonment.

[3] The sentences imposed on counts 1, 2 and 5 were ordered to run concurrently with the sentence imposed in respect of counts 3 and 4. The effective term of imprisonment therefore was life imprisonment.

[4] With leave of Satchwell J to appeal against the sentences only, the matter came before the Full Court of this Division, consisting of Goldstein, Malan and Maluleke JJ. The Full Court remitted the matter to Satchwell J to investigate the issue relating to possible transmission of HIV by the appellant to the complainant as a result of the rape, and to impose sentences accordingly, in respect of counts 3 and 4. The Full Court dismissed the appeal on sentences in respect of counts 1, 2 and 5.

[5] Upon consideration of the issues raised by the Full Court, Satchwell J sentenced the appellant afresh, in terms of which the sentences originally imposed in counts 1, 2 and 5 were retained, while the sentence of life imprisonment imposed in respect of counts 3 and 4, were replaced with 20 years each of the respective counts. The sentences imposed in respect of counts 1, 2 and 5 were ordered to run concurrently with the sentence imposed in respect of count 3. Ten years of the sentence imposed in respect of count 4 were ordered to run concurrently with the sentence imposed in respect of count 3. Effective term of imprisonment was thus 30 years.

[6] Once again with leave of Satchwell J the matter is now before us. The appeal is against the sentences imposed in respect of counts 3 and 4.

[7] It is useful to briefly outline the circumstances under which the offences were committed. On 15 September 2002 in Tembisa, the complainant, Ms Johanna Mahlangu was on her way to work at approximately 04h25 in the morning. She was in the company of a male companion. They met the appellant, who produced a firearm and forced the complainant into the direction of an RDP house. Before forcing her to enter the house, he robbed the complainant of her jewellery and a cellphone. Once inside the house, still at gunpoint, the appellant ordered the complainant to remove her clothes. The appellant then raped the complainant.

[8] After he had finished, the appellant ordered the complainant to put on her clothes and move out of the house. He ordered her into a bush where he raped her once again. After he finished, they parted ways and she went straight to the police station to report the rapes and the robbery. The police took her to the hospital where she was treated. She did not suffer any physical injuries.

[9] It is with this factual background in mind, as well as the appellant's personal circumstances, that this appeal should be considered. With regard to the personal circumstances of the appellant, the following are pertinent: he was 20 years old when the offences were committed; he went up to standard six at school; he lived with his parents and two siblings in Tembisa. He had a previous conviction of housebreaking with intent to steal and theft, committed in 1999 where he was sentenced to two years imprisonment, wholly suspended for five years on certain conditions. He had been in custody for two and a half years at date of sentence.

[10] Satchwell J, in imposing the sentences of 20 years each on counts 3 and 4, found the period spent in custody awaiting trial by the appellant, to constitute substantial and compelling circumstance, which warranted the imposition of sentences other than life imprisonment. Whether or not one agrees with Satchwell J as to the basis upon which she

found substantial and compelling circumstances to have existed, I am satisfied having regard to all circumstances in this matter, that substantial and compelling circumstances do exist.

[11] The test in an appeal against sentence is trite, namely whether the trial court misdirected itself in considering sentence or exercised its discretion in an unreasonable manner. Put differently, whether the sentence, in the circumstances of the case, induces a sense of shock or is disturbingly disproportionate. See *S v Pieters* 1987 (3) SA 717 (A). Indeed sentence is eminently the discretion of the trial court. The court of appeal's powers are limited.

[12] Mr *Motaung*, attorney for the appellant, urged us quite strongly, to consider the pattern of sentences imposed by the Supreme Court of Appeal in recent judgments concerning rape matters, wherein sentences ranging between 16 and 18 years imprisonment were imposed. Predictably, his argument was premised, in the main, on *S v Mahomotsa* 2002 (2) SACR 435 (SCA); *S v Vilakazi* 2009 (1) SACR 552 (SCA) and *S v Egglestone* 2009 (1) SACR 244 (SCA).

[13] In my view, all of the three cases are distinguishable from the present case, on the facts. In *Mahomotsa*, the appellant raped two women at different points in time, each woman raped once. In the present case, the complainant

was raped twice. In *Vilakazi*, the complainant asked for a lift from the appellant, who then raped her. In the present case, the complainant was on her way to work, and was threatened with a gun, whereas in *Vilakazi*, no gun was used. Without in any way condoning the facts which presented themselves in *Vilakazi*, they are nevertheless distinguishable from the present case. In *Egglestone*, the appellant was convicted of only one count of rape of a woman who was part of a group of young women lured for employment as escort agency prostitutes. Again the facts are distinguishable.

[14] In the present appeal, the complainant was on her way to work and had no business or communication with the appellant. She was pointed with a gun and robbed of her items, forced into a house where she was raped, after which she was escorted to a bush where she was raped again. This must have been a particularly terrifying and traumatic experience for the complainant.

[15] Another aspect of aggravation is a distinct possibility of premeditation by the appellant. He was a standard 7 pupil at the time of the commission of the offence. For him to be out in the street at 04h25 in the morning, is probably that he had formed a clear intention to commit a crime, possibly of rape. I say this because the complainant's male companion was let to go.

[16] To my mind, the Legislature, when enacting the Criminal Law Amendment Act 105 of 1997, must have had in mind, preventing people from roaming the streets with unlicensed firearms. A disturbing feature of the most serious crimes that come to this Court on appeal, and in trials is that such crimes are committed mostly by relatively young people, who act in callous, brazen and merciless manner towards their victims. Rape is obviously a serious offence "constituting … a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim" (*S v Chapman* 1997 (2) SACR (SCA) at 5b).

[17] Society is justifiably indignated by the increasing wave of violent crime engulfing the country. As a result, expectations are understandably high that the courts would, through their sentences, and within the legislative framework and common law, give expression to the society's indignation.

[18] During the week commencing on 11 August 2009, I sat with, and respectfully concurred in the judgments of Willis and Makhanya JJ in *Ntsheno v The State* (Case No. A181/09) and *Dlamini v The State*, (Case No 182/09), wherein minimum sentences were applicable to youthful offenders. I have found the views expressed therein to be helpful.

[19] I have carefully had regard to the well-reasoned judgment of Satchwell J on sentence in this matter, and am unable to find any misdirection, either on the application of the law, or on the evaluation of the circumstances of the case. However, the learned judge failed to adequately consider the cumulative effect of the various sentences, which, in my view, renders the effective period disturbingly disproportionate under the circumstances. In the light of the recent decision of the Constitutional Court in *Centre for Child Law and Minister of Justice and Constitutional Development and Others* (CCT 98/08; [2009] ZACC 18) this Court is therefore at large to interfere with the sentences, and replace them with sentences we deem appropriate. An effective period of 30 years is excessive in the circumstances. In my view an effective period of 23 years imprisonment would seem appropriate.

[20] In this regard the *dictum* of Holmes JA in *S v V* 1972 (3) SA 611 (AD) at 614H is worth mention:

> The law operates to protect women against outrage. As to that, if there be any who doubt whether a massive sentence of imprisonment for 20 years will not be a sufficient expiation for the gravely evil misdeeds of this youth, let them cast their minds back in their own lives over that period, and consider how much has happened to them in those two decades, and how long ago it has seemed, although enlivened by domestic happiness and the free pursuit of their avocations. No such

> ameliorations attend the slow tread of years when you are locked up.

[21] It should be recalled that the sentences imposed by Satchwell J on counts 1, 2 and 5 on 7 March 2005, were confirmed by the Full Court.

[22] In the result the following order is made:

1. The appeal on sentence in respect of counts 3 and 4 is upheld but only to the limited extent that it relates to the order of the duration of concurrency;

2. The sentences of twenty years' imprisonment imposed on each of counts 3 and 4 by Satchwell J on 24 July 2007 are confirmed.

3. The order by Satchwell J on 24 July 2007 as to concurrency of the sentence, is set aside and in its place the following is substituted:
   "The sentences imposed on counts 2, 4 and 5 are to run concurrently with the sentence on count 3"

4. The effective sentence is therefore 23 years imprisonment;

5. The aforesaid sentence is antedated to 7 March 2005 being the date of the first sentence.

DATED AT JOHANNESBURG THIS 8TH DAY OF SEPTEMBER, 2009

T. M. MAKGOKA

JUDGE OF THE HIGH COURT

I agree.

N.P. WILLIS

JUDGE OF THE HIGH COURT

I agree.

G.M. MAKHANYA
JUDGE OF THE HIGH COURT

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